

CONCEPT OF RIGHTS IN ISLAMIC LAW

**By.
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Introduction

The whole Islamic law is based on a system of rights.¹ Right and its protection is the main consideration of Islamic law. Usually Islam is projected as rigid and irresponsible to social realities.² As a Muslim it is our responsibility to contribute in efforts to remove this misconception. In this Article my endeavor would be to make clear Islamic law's stand towards 'rights' and the 'rights of minor' as I am taking rights of minor as a case study here.

First of all I will discuss the concept of rights in Islamic law in which I will take into account the source of right, its elements, and kinds of rights with some emphasis on the right of State as it is a disputed issue. Correlativity of right

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¹-Imran Ahsan Khan Nyazee, *Theories of Islamic law*, ed. Zafar Ishaq Ansari, (Islamabad: International Institute of Islamic Thought & Islamic Research Institute, 1994), 73. [Hereinafter Nyazee,1994].

²-Katerina Dalacoura, *Islam, Liberalism & Human Rights*, (London & New York: I. B Tauris Publishers, 1998), 43. [Hereinafter Katerina , 1998].

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and duty and the relation of rights with maqāsid al-sharī'ah will also be discussed.

Then I will switch to the concept of rights of minor. I will discuss who is a minor? Or what is the dispute of minimum age? and will elaborate Islam's stand on the issue. In it capacity of minor and its relation with his rights will also be discussed. It will be followed by the discussion that do children really have rights? If they have rights then how they will exercise them? I will elaborate that the interest of the child is Islamic law's main consideration in this respect. At the end I will summarize my findings in the conclusion.

1.1. Concept of Rights in General

1.1.1. Meaning Of The 'Right'

In Arabic the word used for 'right' is 'haqq' it literally means justice, right or rightness, truth or reality or fact.¹ The word haqq is used in meaning of right, title and claim.² According to Tabandeh a right is translated as the 'others duty'.³

In basic sources 'right' is not formally defined by the fuqahā. Probably the reason was that it was a widely understood concept and there was no need to properly define it. But modern jurists tend to define the term 'right'.

¹-E.W. Lane, Arabic-English lexicon, (Lahore: Islamic Book Center, 1982), 609-610, s.v. 'haqq'

²-Al-Mawrad, (Dār-ul-Ilm Lilmalāyīn, 1997), 480. [Hereinafter Al-Mawrad, 1997].

³-Katerina, 1998, 54.

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¹ The word is some times defined as 'a benefit to which one is legally entitled'² or it is 'a specific relation between person entitled and the benefit or interest'.³ The word haqq or haqūq means legal rights or claims, and corresponding obligations. ⁴

As mentioned above haqq or right includes all kinds of rights, titles and claims. It includes proprietary rights, personal rights, positive and negative rights, vested and contingent rights, legal rights and natural rights etc. Rights are protected through social obligations i.e. by creating duties. ⁵

1.1.2. Source of the Right

Source of right in Islamic law is Shār'e. ⁶ Shār'e or lawgiver established these rights to organize man's life. He gave us system of rights and duties, and made it an important part of Islamic legal system. This is the most important feature of concept of rights in Islamic law. As the Shār'e gives rights so the Shār'e alone can take these.

¹-Al-Qutab Muhammad Qutab, *Al-Islām Wa Huqūq ul-Insān*, (Dār-ul-Fikr Al-Arabī, 1994), 32. [Hereinafter Al-Qutab Muhammad Qutab, 1994].

²-Shaikh Zain-ud-Dīn Ibn-e-Nujaim, *Al-Bahr Al-Rāiq Sharh Kanz Al-Daqāiq*, (Quetta: Al-Maktaba Al-Mājadiyya), Vol. 6, 136. [Hereinafter Ibn-e-Nujaim].

³-Wahba Al-Zuhailī, *Fikh-al-Islāmī Wa Addillatuh*, (Damascus: Dār-ul-Fikr, 1989), 9. [Hereinafter referred to as Wahba Al-Zuhailī, 1989].

⁴-The Encyclopedia of Islam, (E. J. Brill, Lieden, 1979), 199, s.v. 'hak, hakūk'.

⁵- Katerina Dalacoura, 1998, 44.

⁶- Wahba Al-Zuhailī, 1989, 9-10.

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State has no power to take these rights ¹ because rights are not given by it. In this respect Islamic law is more protective for rights especially with reference to human rights as an Islamic State can not suspend these rights in any circumstance. ² The reason behind this is that how a State can take those rights which are not given by it? Here one can go to the court for enforcement of his right whether it is recognized by the State or not, as it is recognized by the lawgiver. In Western law, according to positivists, State is the source of all rights. As a result it can take these rights back and can suspend them in case of emergency. This is the approach, which is followed in Pakistan. One example of it is suspension of fundamental rights during the government of Nawaz Sharif in 1998.

Islamic law gives so much importance to rights that every person is commanded to defend his right and fight for it in case of threat of infringement. ³ At the same time a person having a right has obligation towards other people: to exercise his right in a way which is not detrimental to

¹-Sulaimān bin Abdurrehmān Al-Hagīl, Human Rights in Islamic law & their application in Saudi Arabia (Translated by Omar F. Atārī), (Imām Muhammad Bin Sa'ud Islamic University, 2001), 128. [Hereinafter Sulaimān bin Abdurrehmān Al-Hagīl, 2001].

²-In this respect the approach of Islamic law is similar to the approach of Naturalists. According to them as well rights are not creation of the State & State has no power to take these rights or suspend them in emergency or in any other situation.

³-Sulaimān bin Abdurrehmān Al-Hagīl, 2001, 125.

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them, and people in general have obligation to respect that person's right.

1.1.3. Elements of the Right

Following are the elements of a right.

1- Owner of the Right

It is the person entitled to the right and is called *Sāhib-ul-haqq*. *Sāhib ul- haqq* may be Allah or a natural person or a legal person like companies, corporations etc. Allah has rights, which are called *huqūq Allah* like prayer, fasting etc. These rights will be discussed later.

Natural personality starts from birth and ends at death. But in Islam a fetus or dead person also has some rights. Islamic law also acknowledges legal personality or artificial personality. Companies, corporations, mosques etc can have rights and also have certain liabilities.¹

2- Subject of the duty

He is a person on which corresponding duty lies. As every right gives rise to a duty. Subject of the duty is that person who is bound to perform certain acts or omissions in respect of the right holder.

3- Subject matter of the right

It is the object from which a right arises like property, debt, mahr, or any other act. There is a condition that the subject matter should not be prohibited by *Sharī'ah*. If it is prohibited, like wine etc, the right is not considered by

¹-Wahba Al-Zuhailī, 1989, 10-11.

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Islamic law. ¹ A person in an Islamic State cannot claim a right on a subject matter, which is prohibited.

1.1.4. KINDS OF RIGHTS

Discussion of rights and its kinds are mostly found in details of 'mahkūm beh' i.e. the act of the subject. As every rule is associated with a kind of right so fuqahā discussed issue of rights under this heading.

Islamic law gives four kinds of rights. ²

1.1.4.1. Right of Allah

According to Sarakhsī right of Allah is of eight kinds. ³

1. Pure worship: It includes belief in Allah, prayer, zakāt, fasting (and i'tikāf as it is associated with fasting), haj (ummrah as it is associated with haj), and jihād.
2. Pure punishments: It includes hudūd punishments like theft, drinking etc.

¹-Al-Qutab Muhammad Al-Qutab, 1994, 39.

²-Sadr-al-Sharī'ah Ubaid Ullah bin Masūd, Al-Tawdīh Sharh-ul-Tanqīh, (Peshawar: Maktaba Farūqiyah, 1996), Vol. 2, 315. [Hereinafter Sadr-ul-Sharī'ah, 1996]; Abī Bakr Muhammad bin Ahmad bin Abī Sahl Al-Sarakhsī, Usul-al-Sarakhsī, (Beirut: Dār-ul-Ma'arifa), vol. 2, 288. [Hereinafter Al-Sarakhsī]; Ibn-e-Nujaim, vol. 6, 136; Alā-ud- Dīn Abd-ul-Azīz bin Ahmed Al-Bukhārī, Kashaf-al-Asrār, (Cairo: Dār-ul-Kitāb Al-Islāmī), Vol. 4, 134. [Hereinafter Alā-ud-Dīn Abd-ul-Azīz bin Ahmed Al-Bukhārī].

³-Al-Sarakhsī, Vol.2, 290 onward. Sadr-al-Sharī'ah, 1996, Vol.2, 316 onward.

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- 3-Imperfect punishments: These punishments are called uqūbah qāsirah. One example of it is prevention of inheritance for murderer from victim.
- 4-The acts vacillating between worship and punishment. Example of it is act of expiation. In it there is an element of punishment as well as element of worship.
- 5-Worship in which there is element of financial liability. Example of it is sadaqa-tul-fitr صدقة الفطر and zakāt.
- 6-Financial liability in which there is element of worship like `usher.
- 7-Financial liability in which there is element of punishment and its example is khirāj.
- 8- Those which exists independently

Sarakhsī described it in three kinds.

Those which are initially laid down as a rule.

- 1- Those which are laid down as an addition to a rule.
- 2- Those which are associated with a rule.
Example of these are the khums levied on cattle, minerals and treasure-troves.¹

1.1.4.2 Right of man

These are civil rights or claims of a human. It includes all those rights, which are not included in other categories.

¹ - Nyazee, 2000, 95.

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Examples of it is property rights, nikāh, talāq, agency, kafālah, mudārabah etc.¹

According to Mālikī Jurists there are further three kinds of rights of man.²

- 1- Right, which an individual owed to God. It includes worship and its purpose is to acquire pleasure of Allah.
- 2- A complete right of man. It is completely right of man and is for his own benefit like prohibition of drinking etc.
- 3- Right of man owed to other people. These are those rights which an individual owed to other individuals like debt etc.

Third and fourth kinds of rights are following.

1.1.4.3. Cases in which right of Allah and right of individual exists side-by-side and right of Allah is predominant. One example of it is case of qadf in it right of Allah is predominant over man.

1.1.4.4. Cases in which right of Allah and right of individual exist side-by-side and right of individual is predominant. A good example of it is qisās or retaliation; here right of man is predominant.

¹- Dayāb Abdul Jawād, 1980, 95.

²-Muhammad Alī Bin Shaikh Hussain Muftī Al-Mālikiyyah, Tahzīb al-furūq Wa al-qawā'id al-sunniyyah fil-asrār al-fiqhiyya, (Beirut: Ālam Al-Kutb), Vol. 1, 157. [Hereinafter Muhammad Alī Bin Shaikh Hussain Muftī Al-Mālikiyyah]

1.1.4.5. Right of State or Community

This is a right of the individuals collectively or the State. Muslim jurists differ about this right. Some jurists did not consider right of the State, according to them there are only four kinds of rights in Islam. Some modern jurists confused this right with the right of Allah.¹ But the fact is that these rights are distinct. One result of this classification is that where an offence against right of State is committed State can pardon it, but it cannot pardon an offence, which is committed against the right of Allah.²

Muslim jurists as stated above were not much concerned about this kind of right. Shāfī jurist Al- Māwardī and Hanbalī jurist Abū Ya'alā discussed rights and duties of imām or the State. Al-Māwardī called this right haqq-al-saltanah i.e. right of State.³

As far as duties of the State or the ruler are concerned it includes preservation and protection of religion, defence

¹-Abdul Rahim, *Muhammadan Jurisprudence*, (Lahore: All Pakistan Legal Decisions, 1911), 201. [Hereinafter Abdul Rahim, 1911];

Abdullah Muhammad Jamāl-ud-Dīn, *Nizām-ud-Dolāh fil Islām*, 315.

²- Nyazee, 2000, 92; Nyazee, 1994, 73.

This confusion can be seen in *Hakim Khan v Govt. of Pakistan*, PLD 1992 SC 595. Where Supreme Court discussed rights of individual & right of Allah but there is no mention of right of State & at the same time some inconsistencies also comes forward as right of State is not acknowledged.

³-Al-Māwardī, *Al-Ahkām Al-Sultāniyyah* (urdu translation by Maulvi Syed Muhammad Ibrahim. Lahore: Qanūni Kutabkhana), 373.

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of State, to implement hudūd, to conduct day to day affairs of State according to the rules of Sharī'ah.¹

According to Muhammad Yūsaf Mūsā concept of a welfare State and duties of a welfare State can also be derived from teachings of Islam and history of khulafā-e-rāshidīn. ² خلفاء الراشدين

About rights of the State or Imām it is said that the two main rights of the ruler are obedience and support if the ruler works under orders and limits of Sharī'ah.³ Islamic State also has the right to legislate for the people in cases where no rule in The Qur'ān or The Sunnah is given. Mostly this is described as right of imām or the ruler.⁴ But in fact it is right of the State exercised by the ruler on State's behalf as the ruler represents the State. There are some other rights of the ruler as a head of a State which are discussed by modern jurists like advice of the people, respect from them and with this he also has right to be informed by the people about performance of his inferiors.⁵ Although these

¹- Zāfir Al-Qāsimī, *Nizām-ul-hukm fi al-sha'riah wa al-tarikh al-Islāmī* (Al-kitāb al-ahwāl al-hayāt al-dustūriyah), (Beirut: Dār-ul-Nafāis, 1985), 352-353. [Hereinafter Zāfir Al- Qasimī, 1985]; Badr-ud-Dīn Bin Jamā'ah, *Tahrīr-ul-Ahkīm fi tadbīr Ahl-al-Islām*, (Qatar: Al-Mahākam Al-Shar'iyyah wa Al-Shaon Al-Dīniyyah, 1987), 65-69. [Hereinafter Badr-ud-Din Bin Jama'ah, 1987].

²-Muhammad Yūsaf Mūsā, *Nizām-ul-hukm fil Islām*, 91, mentioned in Zāfir Al-Qāsimī, 1985, 345.

³- Zāfir Al-Qāsimī, 1985, 345.

⁴-Ibid, 356.

⁵-Ibid, 358-360.

Badr-ud-Dīn Bin Jamā'ah, 1987, 61-64.

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rights are enumerated separately but these fall either under heading of obedience or support.

As far as children are concerned Islamic State has power to legislate for them and to make laws for protection of their rights. There is a hadīth to this effect 'the sultān is the guardian of one who does not have a guardian' ¹ So where the natural guardian is not fulfilling his duties or there is no guardian for the child, State has authority to protect minor's person and property.

There is a lot to be done in the field of rights of the State as it remains a neglected field till now but there is no scope to discuss it here in detail.

1.1.5. Correlativity of Rights & Duties.

Like Common law, in Islamic law as well for every legal right there is a corresponding duty.² One example of it is iqāmat-ul-hudūd إقامة الحدود , it is right of Allah this right creates a corresponding duty in the ruler or imām to establish it. In Islamic law every rule is linked with a kind of right whether it is right of Allah or right of individual or right of State. The rules create corresponding obligations or duties.³ The rule for a ruler regarding iqāmat-ul-hudūd is linked with right of Allah and creates obligation or duty in imām to establish these hudūd. In Islamic law rights are

¹-Imran Ahsan Khan Nyazee, *Islamic Law & The CRC*, Islamabad Law Review, Spring & summer 2003, 113. [Hereinafter Nyazee, 'A', ILR, 2003].

²- Zāfir Al-Qāsimī , 1985, 325.

³-Nyazee, 2000, 96.

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always associated with duties. So a right of an individual is considered as a duty for others and also for the owner of the right. His duty is to defend his right and to fight for it if it is infringed.¹

1.1.6. Rights & Their Relation With Maqāsid Al-Sharī'ah مقاصد الشريعة

There are five objectives or maqāsid of sharī'ah. Islamic Law is supposed to serve these maqāsid.

1. Hifz alā dīn..حفظ الدين
2. Hifz alā nafs..حفظ النفس
3. Hifz alā nasl..حفظ النسل
4. Hifz alā aql..حفظ العقل
5. Hifz alā māl..حفظ المال

The whole system of Islamic law revolves around these objectives. These Objectives or maqāsid are definitive. Hifz include establishment and protection.² From establishment we mean to establish its elements and foundations and from protection we mean to protect it from what damages the aspect of establishment and produce disharmony.³

When we use the term Islamic State it means that in that State Islamic law or Sharī'ah should be the supreme law of the land i.e. the State should adhere to strict

¹-Sulaimān bin Abdurrehmān Al-Hagīl, 2001, 125.

²-Abū Ishāq al-Shātībī, Al-Mawafaqāt fī Usūl Al-Sharī'ah, (Cairo: Dār-ul-Fikr Al-Arabī), vol.2, 8.

³-Ibid.

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application of Sharī'ah and to its maqāsid or objectives.¹ Most of the rights and duties emerge from these maqāsid.² It is duty of the State to establish dīn and to protect it. This duty corresponds a right in people to have freedom to practice religion. Right to life emerges from hifz alā nafs. This is a primary right and gives rise to many accessory rights like right to food, health, shelter, livelihood etc. These are the rights, which increase scope of primary rights. It is the approach of Pakistani courts as well, in a judgment it is said by the Supreme court that 'right to life doesn't mean vegetative or animal life but includes such amenities, facilities and personal rights as should be enjoyed by a person born in a free country'.³ Right to marriage and a child's right to the status of legitimacy emerge from hifz alā nasl. Hifz al-aql give rise to right of education and right of freedom of expression of opinion. Hifz alā-māl give rise to rights related to property.

These rights further develop and give rise to other rights. There are accessory rights to these primary rights. Every other right, which facilitate, support or increase scope of these rights is termed as accessory right. Sanctioning rights can also be derived from these maqāsid, if a right is violated, as a result there will be another right to receive remedy. If your right to life or education or any other right is violated you as a result have right to receive remedy, this may be in form of compensation or specific performance etc.

¹-Sulaimān bin Abdurrehmān Al-Hagīl, 2001, 35.

²-Nyazee, 1994, 262.

³-The State v Muhammad Hasham Babar, PLD 1997 Lahore 605; Shehla Zia v Wapda, PLD 1994 SC 693.

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From these maqāsid duties and rights of the State can also be determined. It is duty of the State to establish and protect these objectives. It is duty of the State to prohibit all acts detrimental to these objectives and their preservation.¹

The order in maqāsid also show a priority list.

Deen has priority over nafs.

Nafs has priority over nasl.

Nasl has priority over aql.

Aql has priority over māl.

This priority list works in case of clash between interests or rights. No person can exercise his right of freedom of expression of opinion by detrimenting dīn; a good example of it is case of blasphemy. Because hifz alā dīn has priority over hifz alā aql, so in case of clash first will prevail. Right of life can be sacrificed for dīn as in case of jihād because dīn has priority over nafs.²

These five maqāsid forms darūriyāt i.e necessities.

Each objective has three kinds of rights: right of Allah, right of community and right of individual.³ Where right of Allah clashes with any other right, it prevails. As in case of zinā when a muhsan is stoned to death, it seems that hifz alā nasl is given priority to hifz alā nafs. Actually right of

¹-Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*, (Islamabad: Advanced Legal Studies Institute, 1998), 26. [Hereinafter Nyazee, 1998].

²-Nyazee, *Islamic Law & Human Rights*, ILR, 2003, 61. [Hereinafter Nyazee, B, ILR, 2003].

³-Nyazee, 2000, 208.

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Allah in *hifz alā nafs* prevails over right of individual in *hifz alā nafs*. Every objective has underlying three rights. Right of Allah is always preferred when it clashes with any other right whether it belongs to most preferred *maqṣad* or least preferred. The priority shown above among *maqāsid* works when both conflicting rights belong to the same category. Where right of man clashes with right of State or vice versa there is no strict rule. In some cases right of State prevails and in others right of individual.

1.2. Concept of Rights of Minor in Islamic Law

Concept of rights is discussed above now I will discuss the concept of rights of minor in Islamic law.

1.2.1. Who Is A Minor?

The word used in Islamic law for minor is *sabī* or *saghīr*. *Sabī* means as lad, youth or boy¹ and *saghīr* means young, child, minor, and junior.² The word *saghīr* is opposite of *kabīr* which means grown-up, adult or old aged.³

In legal terms what majority means is the particular age at which a person has right to undertake certain acts or where he will be held fully responsible for his acts. This all is dealt in Islamic law under capacity for execution. According to majority of jurists this capacity is only attained

¹- Al-Mawrad, 1997, 688.

²- Al-Mawrad, 1997, 695.

Ibn-e-Manzūr, *Lisān-ul-Arab*, (Beirut: Dar Lisān-ul-Arab), vol. 1, 444. [Hereinafter *Lisān-ul-Arab*].

³- Al-Mawrad, 1997, 881.

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at puberty.¹ It means that in Islamic law a person is minor until he attains puberty. After attaining puberty every one has full capacity to exercise his rights and to perform his duties. In case signs of puberty are not there, Muslim jurists fix a particular age. A person who attains that age although there are no signs of puberty is declared as major in Islamic law.

This age according to majority of jurists is 15 years and according to Abū-Hanīfa it is 18 years for a boy and 17 years for a girl.² According to the two disciples of Abū-Hanīfa minority ceases at the completion of 15th year.³ The reason behind this is that at this stage it is presumed that discretion is attained in the case of both sexes i.e. male and female.⁴ According to one tradition of Abū-Hanīfa puberty of a boy will be established on his completion of nineteen years.⁵ If we take Hanafī view which looks more appropriate here, a boy before age of 18 and a girl before age of 17 are declared as minors if there are no signs of puberty.

At this point we see that Islamic law has clearer stand than Common law as in Western law it is still not decided that person of which age should be declared as a minor. There, for different purposes different age limits are fixed.

¹- Nyazee, A, ILR, 2003, 114.

²- Dayāb Abdul Jawād Attā, 1980, 158.

³-Al-Marghenāni, Hadāya, English Translation by Charles Hamilton, (Lahore: Premier Book House, 1975), Vol. 3, 529. [Hereinafter Al-Marghenāni, 1975].

⁴-Liaquat Ali Khan Niazi, Islamic law of Contract, (Lahore: Research Cell Dayal Singh Trust, 1990), 134.

⁵- Al-Marghanāni, 1975, Vol. 3, 529.

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As a result there is confusing disparity in this regard.¹ Probably the main reason for this disparity in definition of child and in deciding minimum age is that there is no theory about the basis of majority in Western law. So the law is arbitrary and there is no fix age of majority, it varies from case to case. For example in case of law related to employment it is mainly based on hazard, if work is of hazardous nature the minimum age is increased and if the work is of light nature the minimum age for employment is lowered. Whereas in Islamic law the age of majority is puberty. The theory working behind is the theory of 'rushd' i.e. aqal and tamyeez (intellect and discretion). There is no method to judge whether a person possess rushd or not, and so it is associated with puberty. Under Islamic law minority is a state of human being after birth and before puberty.²

1.2.2. Legal Capacity of Minor

Rights of minor are related with his legal capacity. It will be appropriate here to discuss capacity of minor so that

¹-For e.g. we see that in Majority Acts usually age is fixed at 18. In acts related to employment of children, some times age is fixed at 14 or 15 etc. Even international documents on this issue have same problem. (Article 2 of ILO Minimum Age Convention No.138, 1973, The Minimum Age Industry Convention, 1919 etc. stated in The State of Pakistan's Children 1998, p-2.)

In Pakistani law also there is no decided minimum age; the upper limit is between 12 & 18. (Section 3, The Majority Act 1875. Section 2(3), The Constitution Of Pakistan 1973. Section 2, The Employment of Children Act 1991.) So in Pakistan also for different purposes different age limits are laid down.

²- Nyazee, 2000, 126.

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concept of rights of minor becomes clear. First I will define legal capacity and then I will go to the capacity of minor.

1.2.2.1. Legal Capacity

Legal capacity in Islamic law is defined as 'the ability or fitness to acquire rights and exercise them and to accept duties and perform them'. Legal capacity is connected with dhimmah, it means liability. It is a condition requisite for existence of legal capacity.¹ Dhimmah is an attribute by which one acquires capacity for acquisition of rights and duties. It is a covenant between lawgiver and the subject ² and it can be assigned to a natural person and to an artificial person as well.³

The definition of legal capacity talks about two types of capacities: capacity of acquisition i.e. capacity to acquire rights and duties, and capacity for execution i.e. capacity to execute these rights and duties.⁴ These capacities are some times called receptive legal capacity and active legal capacity respectively.⁵

Because of capacity of acquisition a person becomes able to acquire rights and liabilities. Manāt or basis for capacity of acquisition is the attribute of being a human. It is of two kinds' complete capacity and deficient capacity. A person having deficient capacity posses only some rights and no obligation is imposed on him.

¹- Nyazee, A, ILR, 2003, 111

²- Sadr-al-Sharī'ah, 1996, 336-337.

³- Nyazee, 'A', ILR, 2003, 111

⁴- Nyazee, 1994, 75; Nyazee, 2000, 110

⁵- Abdur Rahim, 1911, 217.

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Capacity for execution is defined as 'the capability of a human being to issue statements and perform acts to which the law giver has assigned certain legal effects'.

This capacity is further divided into three kinds.

- 1- Legal Capacity for Criminal Liability: It is based on the ability to comprehend the communication pertaining to criminal act.
- 2- Legal Capacity for Ibadāt. This capacity is based on the ability of subject to understand or comprehend the communication of lawgiver pertaining to ibadāt.
- 3- Legal Capacity for Mu'amalāt or Transactions. It is legal capacity based on the ability of subject to comprehend communication pertaining to transactions.¹

After this brief introduction now I will switch to capacity of minor and elaboration of rights of minor as related with this capacity. First I will discuss legal capacity of unborn child or janīn and rights which an unborn child possesses then I will discuss capacity and rights of minor.

1.2.2.2. Legal Capacity of Janīn جنين or Unborn Child

A janīn or unborn child possesses deficient capacity i.e. only some rights are established for unborn child, these are those rights which do not require acceptance,² and no duty is imposed on him. The reason that why unborn child is assigned deficient capacity is that basis of legal capacity in case of unborn child is not fully developed. He is not

¹- Nyazee, 2000, 112.

²- Like parentage, inheritance etc.

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considered as an independent personality because in some respects he is considered as a part of her mother. But in other respects he is considered as an independent personality as he has a separate life. So he is assigned deficient capacity. As said earlier he has some rights like inheritance, parentage etc. but no obligation can be imposed upon him. For e.g. if guardian of the janin buys some thing on its behalf, he is not liable for the price. He is also not liable to maintain his close relatives. ¹A child after birth acquires capacity for imposition of obligations. But this capacity is also of defective character. This will be discussed later.

In Islamic law janin is considered a separate legal person as if it is aborted a special indemnity (ghurrah) is to be paid ² and this indemnity or money is devolved on the heirs of the child.³

Janīn or unborn child has following rights; right of parentage or lineage, right to inheritance, right of itaq, right in wakaf. These rights would be assigned to janīn only if it

¹-Abdur Rahim, 1911, 240; Ala-ud-Dīn Abd-ul-Azīz bin Ahmed Al-Bukharī, vol.4, 239-240; Nyazee, 1994, 79.

²-Muhammad bin Idrīs Al-Shāfī, Kitāb-ul-Umm, (Beirut: Dar-ul-Ma'arifa), vol.6, 107. [Herein- after Al-Shāfī]; Alī Abdul Hamīd Baltarjee & Muhammad Wahbī Sulaimān, Al-Mu'tamid fī Fikh Al-Imām Ahmad, (Dār-ul-Khair, 1991), vol.2, 375; Mālik bin Anas, Al-Mudawanah Al-Kubrā, (Beirut: Dār-ul-Kutb Al-Ilmiyyah, 1994), Vol.4, 630.

³-Joseph Schacht, An Introduction to Islamic Law (Oxford: Clarendon Press, 1982), 124. [Hereinafter Joseph Schacht, 1982].

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is born within six lunar months from the establishment of right.¹

1.2.2.3. Legal Capacity of Child after Birth

After birth a child possesses complete capacity for acquisition of rights and duties. As far as capacity for execution is concerned a minor before puberty lacks this capacity. If he attains some discretion then he is assigned deficient capacity for execution. For this purpose jurists determine the age at 7. Before age of seven minor is called *sabī ghair mumayyaz* and after seven till puberty he is called *sabī mumayyaz*. This deficient capacity for execution is with respect to transactions.² These transactions are divided in three categories.³

1- Beneficial Transactions.

These transactions are those which are purely beneficial like acceptance of gift etc.

A minor is allowed to make such transactions but with permission of *walī*.

2- Harmful Transactions.

These transactions are those which are purely harmful or which results in financial loss like *sadaqa*, loan, *wasiyyah* *وسيلة* or bequest etc. These transactions are void even if

¹- Joseph Schacht, 1982, 124.

²- As far as criminal liability is concerned a person is not liable till he attains puberty, and *Ibadat* are not obligatory on the minor because he did not possess capacity for execution. *Ibadat* are right of Allah so are not imposed on minor.

³- *Sadr-al-Sharī'ah*, 1996, vol.2, 344-346.

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made by walī because he has no authority to enter in such transactions.

3- Transactions vacillating between profit and loss.

These are the transactions which vacillate between profit and loss like partnership, sale etc. These transactions are only valid after ratification of walī otherwise these will be void.

This all is according to Hanafi jurists because majority of jurists are of the view that Minor lacks capacity for execution till puberty.¹

1.2.3. Does A Minor Really Have Rights?

There is an approach that children do not have rights. What we called children's rights are in fact parent's duties. But approach of Islamic law is different it does not agree with this approach. In Islamic law children do have rights. As it is discussed earlier children have capacity of acquisition so they have rights. Even unborn child possesses some rights.

Although children have rights, but they are not free to exercise these rights because they don't possess capacity for execution.²

1.2.4. How A Minor Exercise These Rights?

Islamic law provides us with institution of wilāyah (guardianship). A child exercises her rights through this

¹- Wahba Al-Zuhailī, 1989, Vol.1, 166-168.

²-Nyazee, A, ILR 2003, 113.

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institution. If father or grand father is guardian of a child they are called walī. If there is no natural guardian or the natural guardian is not fulfilling his responsibilities as enunciated by Shari'ah then State has power to appoint guardian through court. In Islamic law guardian appointed by the court is called wasī. This power of State is derived from the hadith 'the sultān is the guardian of one who does not have a guardian'. So State has power to appoint a guardian where there is no guardian for a minor.¹

The guardian, whether a parent or a person appointed by the court, has authority to make a contract on behalf of the minor. According to jurists transactions made by walī on behalf of minor are enforceable and valid even after his majority except contract of marriage.²

But authority of walī is restricted by the condition that he can make only those transactions which are beneficial to the minor. If there is a disposition or transaction, which is harmful to him, it cannot be enforced.³

In Islamic law there are also certain conditions for guardian like he should be adult and sane person, should follow the same religion as followed by the minor and he should be capable of performing his duties as a guardian.⁴

¹-Ibid.

²-Hussain Hamid Hassan, *An Introduction To The Study Of Islamic law*, (Translated by Ahmad Hassan), (Islamabad: Leaf Publications, 1997), 397. [Hereinafter Hussain Hamid Hassan, 1997].

³ - Sadr-ul-Shari'ah, 1996, vol.2, 345

⁴ - Hussain Hamid Hassan, 1997, 397.

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All these conditions are laid down to protect interest of the minor. So walī can make any transaction, within the limit of his authority, if it is in the interest of the minor and he cannot make any transaction, which is against the interest of the minor. It is a general rule laid down by the jurists.

1.2.5. Islamic Law's Main Consideration: Interest of the Minor

From all this discussion we can conclude that Islamic law's main consideration while laying rules for minor is his interest.¹ This is the reason behind institutions of wilāyah and wasāyah. To make it sure that the interest of the minor must be protected Islamic law imposes restrictions on the authority of guardian. As discussed earlier a guardian can make only those transactions, which are beneficial and cannot make any transaction which is harmful. Even if he enters in such transaction it would be void. So the main consideration in Islamic law is interest of the minor. For this consideration a minor is not liable for criminal acts and ibadāt are also not imposed on him. In financial transactions Islamic law gives a way because it is need of a minor. A minor who attains maturity i.e. discretion is also allowed to make beneficial transactions with permission of walī.

These all rules are there to save and protect minor's interests so that he and his wealth could be protected till he himself becomes able to exercise his rights and fulfill his duties.

¹- Nyazee, 'A', ILR 2003, 117.

Conclusion

The concept of right is the base of whole Islamic law. It gives so much importance to the protection of rights that its protection is made a duty of the right holder as well as of the other people. In Islamic law source of right is Shār'e or lawgiver that's why State is not empowered to suspend or take away these rights. Every citizen can go to the court for enforcement of his right whether it is guaranteed by the constitution of the State or not as the lawgiver does guarantee it. There are four kinds of rights in Islamic law: right of Allah, right of man, where right of Allah and right of man exists side by side and right of State or community. This fourth kind is not clearly mentioned by fuqahā, they sometimes mix it with right of Allah but these are distinct.

Like Common law in Islamic law also for every legal right there is a legal duty so right and duty are correlative. All basic rights can be derived from maqāsid al-sharī'ah. These maqāsid also indicate priority among rights in case of clash.

In Islamic law minority is a stage between birth and puberty. If there are no signs of puberty then jurists determined a particular age at which a person would be considered an adult. Notion of rights is linked with legal capacity so it is also relevant here. Not only child after birth but unborn child is also considered as a legal person and possess some kinds of rights. Islam didn't agree with the viewpoint that children don't have rights and what are considered their rights are in fact duties of the parents. A minor possesses capacity for acquisition so he has rights

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but he lacks capacity for execution so he exercises these rights through his guardian.

The main point in all this discussion is that the main consideration of Islamic law in all these issues is interest of the child as the whole law related to minor is supposed to protect interest of the child through various institutions.

At the end I emphasize on the point that Islamic law contributes a lot in the field of rights and especially in field of the rights of minor. What we need is to develop our law in this field and let it contribute in our legal systems to make it clear that this law is more effective in enforcement and protection of rights.

